

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ERIC WILTON BURTON,  
  
Petitioner,  
  
v.  
  
MATTHEW CATE, Secretary of California  
Department of Corrections and Rehabilitation,  
  
Respondent.

Civil No. 08cv0325-LAB (POR)

**ORDER DENYING MOTION FOR  
EVIDENTIARY HEARING**

**[Document No. 183]**

On August 6, 2010, Petitioner filed a Motion for an Evidentiary Hearing. (Doc. 183.)  
Petitioner contends he is entitled to an evidentiary hearing in light of newly discovered material  
exculpatory evidence, allegedly suppressed by the prosecution.

A state habeas petitioner is entitled to an evidentiary hearing on a claim (1) if he did not  
receive a full and fair evidentiary hearing in state court, (2) if he did not fail to develop facts in state  
court, and (3) if he alleges facts that, if proven, would entitle him to relief. Baja v. Ducharme, 187  
F.3d 1075, 1078-79 (9th Cir. 1999).

On February 9, 2010, Respondent filed a Motion to Dismiss the First Amended Petition.  
(Doc. 143.) On June 30, 2010, this Court filed a Report and Recommendation denying  
Respondent's Motion to Dismiss. (Doc. 168.)

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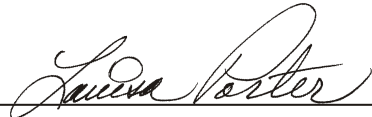
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1 In light of the pending Motion to Dismiss before District Judge Larry Burns, the Court  
2 hereby DENIES without prejudice Petitioner's request as premature. If the case proceeds after a  
3 Motion to Dismiss, the Court will consider and order an evidentiary hearing if necessary.

4 **IT IS SO ORDERED.**

5 DATED: August 20, 2010

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7 LOUISA S PORTER  
8 United States Magistrate Judge

9 cc: The Honorable Larry A. Burns  
10 all parties  
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